No. 88-1022

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, HOWARD AND SUSAN SPIELBERG, as his next friend; HOWARD SPIELBERG AND SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

If this Court grants the petition for writ of certiorari, the Respondents request this Court also to consider, as an alternative ground for upholding the judgment of the Fourth Circuit, the following issue:

> **Under the Education for All Handicapped Children Act, where a school system seeking to change the educational placement of a child requests a due process hearing, and the school system is unsuccessful at the local due process hearing in establishing the appropriateness of its Individual Educational Program (IEP), but is successful at the state administrative review, does the school system retain the burden of proving the appropriateness of its placement when the United States District Court makes its independent review of the appropriateness of the IEP?**

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STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. § 1401(18)(D) provides:

> The term 'free appropriate education' means special education and related services which ... are provided in conformity with the individualized education program.

Alaska Education Regulations, Chapter 52, § 150(a) provides:

> Each district shall place the child after development or revision of an IEP in conformity with the IEP.(emphasis added).

Connecticut State Plan for Part B of the Education of the Handicapped Act as Amended by P.L. 94-142, § 10-76-d-16 provides:

> Each board of education shall make educational placements in accordance with the requirements set forth in the individualized education program of each child ....

District of Columbia State Plan, Fiscal Year 1987-1989, § 3007.4 provides:

> Upon completion of the IEP conference, the child study team shall recommend a program and placement for the student.(emphasis added).

Indiana State Board of Education

Rules, Regulations and Policies, Rule

S-1(4)(E)(3)(c) (1978) provides:

> Following the determination of eligibility and development of an individualized education program, the Case Conference Committee shall recommend appropriate placement ....(emphasis added).

Louisiana Regulations For

Implementation of the Exceptional

Children's Act, § 445(A) (1983)

provides:

> When the IEP development section of the meeting is completed, the school system should initiate the placement section of the meeting immediately following the IEP meeting.(emphasis added).

New Hampshire Standards for Education

for the Handicapped Students, § 1115.02

provides:

> The decision to place any educationally handicapped student shall occur after and pursuant to the approval of an Individualized Education Program....(emphasis added).

Regulations Governing Special

Education Programs For Handicapped

Children And Youth In Virginia,

II(B)(2)(i)(1)(b) provides:

> Each LEA placing a child shall ensure that ... [e]ach child's educational placement ... [i]s based on his/her IEP ....

Virginia Proposed Regulation

II(B)(2)(6)(b), p. 71 provides:

> Where a child is presently receiving the services of a private school or facility, or <u>where the parents and the LEA agree</u>, prior to the development of an IEP that a private school or facility <u>may</u> be required when the IEP is completed, the local school division shall ensure that a representative of the private school attends the meeting.... (emphasis added).

Appendix C to 34 C.F.R., Part 300,

Question 5, p.74 (1987) provides:

> 5. <u>For a handicapped child receiving education for the first time, when must an IEP be developed</u> -- <u>before placement or after placement</u>?
>
> .... The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at an IEP meeting, it would not

be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement.(emphasis added). Id. at Ques. 5, p. 74.

STATEMENT OF THE CASE

The Respondents, Jonathan, Howard and Susan Spielberg, respectfully request this Court deny the petition for writ of certiorari.

In disagreement with Petitioners' (Henrico County) Statement Of The Case (Petition for Certiorari p. 17), the Spielbergs point out that the trial court did not base its finding of a procedural violation of the Education For All Handicapped Children Act (EAHCA or EHA) solely on a letter dated September 13, 1985. As indicated by the Petitioners Appendix To Petition For Writ Of Certiorari pp. 53-56 (Pet. App.) the trial court relied upon "documentary and other evidence presented in this action which clearly evince a predetermination of the placement issue." (Id. at 53). The trial court then made reference to

specific pieces of evidence, one of which was this letter of September 13, 1985.

In addition to the information contained in Henrico County's Statement of the Case, the Spielberg's point out that the Fourth Circuit in this case was also presented with the question of whether the IEP drafted by Henrico County would, in the absence of the procedural violation, provide Jonathan with a free appropriate public education (FAPE). The trial court held that Henrico County had failed to meet its burden of proof on the appropriateness of the IEP even in the absence of the procedural violation.

Affirming the trial court's decision that Henrico County's action would not provide a FAPE, the Fourth Circuit based its decision on the procedural violation. The Fourth Circuit did not accept the trial court's reasoning on the question of the IEP's appropriateness absent the

procedural violation. The Fourth Circuit stated that the trial court had improperly placed the burden of proof on that question on Henrico County. Since the procedural violation provided an alternative rationale for affirming the trial court's decision, there was no need to remand to the trial court for a rehearing on whether, in the absence of the procedural violation, Henrico County's IEP would provide a FAPE.

REASONS FOR DENYING THE WRIT

I. Henrico County's Petition Should Be Denied Because It Raises Issues Which Are Purely Factual.

A. Contrary To The Argument Advanced By Henrico County, The Fourth Circuit's Decision Is Consistent With This Court's

Decision In Board of Education Of Hendrick Hudson Central School District v. Rowley, And Is Merely A Straight Forward Factual Application Of Rules Enunciated By This Court As Long Ago As Rowley And As Recently As Honig v. Doe.

The EHA provides extensive procedural protection to the parents of handicapped children. An important element in the procedural protection afforded under the EHA is the right to parental participation in all stages of the educational process. Board of Education Of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). As stated by this Court in Rowley, "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with

procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard." Id. at 205-206. Even more recently, in Honig v. Doe, 108 S. Ct. 592, 598 (1988), this Court emphasized the importance of "meaningful input [by the parents] into all decisions affecting their child's education ...."

This Court requires that courts hearing cases under the EHA to make a determination of procedural compliance. Rowley, at 206-207. Consistent with this requirement, the trial court made the factual finding, and the Fourth Circuit concurred, that Henrico County unilaterally decided to move Jonathan prior to development of an IEP on which that placement decision could be made. As the Fourth Circuit stated: "The decision

to place Jonathan at Randolph before developing an IEP on which to base that placement violates [the law]. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough." (App. 12-13).

Having made that factual determination, the appropriate remedy for the procedural violation was clear. The remedy, without dissent among the circuits, has been to find the school system's action would not provide the FAPE required by the EHA See e.g., Jackson v. Franklin County School Board, 806 F.2d 623, 629 (5th Cir. 1986); Hall v. Vance County Board of Education, 744 F.2d 629, 635 (4th Cir. 1985).

B. Even Assuming Henrico County Were Correct That Some Procedural Violations Are Not

Sufficient To Find A Failure To Provide A FAPE, Both The Trial Court And The Fourth Circuit Panel Made A Factual Determination That The Procedural Violation In The Instant Case Was Significant, And Hence, A Necessary Predicate To Henrico County's First Question Presented Is Missing.

Henrico County argues that the Fourth Circuit's decision in the instant case is inconsistent with this Court's decision in Rowley, 458 U.S. 176 (1982). Henrico County argues that the Fourth Circuit rejected what Henrico has labeled an "adequate compliance standard" and substituted a "zero tolerance" standard for review of procedural violations.

Even assuming Henrico County were correct that some procedural violations are not sufficient to find a failure to provide a FAPE, the procedural violation in the instant case was found by both the trial court and the Fourth Circuit panel to be a significant violation.

In the trial court's original decision, the court stated: "Placing a handicapped child without reference to his I.E.P. violates both the letter and spirit of the Act and its implementing regulations." (Petitioners' App. 56) The Fourth Circuit in language very similar stated: "The decision to place Jonathan at Randolph before developing an IEP on which to base that placement violates [the law]. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough." (Pet. App. 12-13). Therefore, based on the factual

findings in the instant case, Henrico County's so called "zero tolerance" issue is not even raised, since the violation was found as a matter of fact to be significant.

Further, even assuming "adequate compliance" is something less than following the regulations as written, exclusion of the parents from decision-making could never constitute adequate compliance. These procedural steps are not mere formalities, nor are they merely technical. The procedures are the primary means by which the parents insure the appropriate program is provided to his or her child. As pointed out in Rowley, "Adequate compliance with the procedures [will] in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." 458 U.S. at 206. See also Jackson v. Franklin County School Board, 806 F.2d 623, 630

(5th Cir. 1986)("[t]he formality of the Act's procedures is itself a safeguard against arbitrary or erroneous decision-making.").

Henrico County, also alleges that the factual finding of a procedural violation was in error. Henrico County alleges that the Fourth Circuit's decision was in error because "the Fourth Circuit panel decided that because Henrico sent ... notice of a proposed change in placement before, rather than after, an IEP with the Spielbergs ...." (Petition for Writ p. 28)(emphasis in original).

This argument is misleading in two respects. First, it implies the trial court and the Fourth Circuit relied solely on one letter to reach the factual conclusion. Indeed, there were many documents and considerable testimony submitted to support the procedural

violation finding. (See Pet. App. pp. 53-56). Second, the argument implies that the courts below found Henrico had made a proposal, when in reality, the lower courts made a factual determination that Henrico County had made a unilateral decision.

Further, to the extent Henrico County premises its petition on an allegation that this factual finding was in error, the petition request must fail. This Court has repeatedly stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). In fact, in situations such as the instant case, where the circuit court has concurred with the factual findings of the trial court, this Court has stated that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding,

cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious an exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949); see also Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980).

II. Henrico County's Argument That There Is No "Intent Test" Under The EAHCA Does Not Raise A Significant Issue Of Law, Since The Fourth Circuit Did Not Look To The Intent Behind Henrico County's Illegal Unilateral Decision By The School System, The Court Merely Determined That Such Illegal Action Had Been Taken.

The lower courts did not look to the intent of Henrico County in making its illegal unilateral decision. In Rowley, this Court stated that part of a court's

analysis of a case arising under the EAHCA is "has the State complied with the procedures set forth in the Act?" Rowley, 458 U.S. at 206. The courts below looked to whether the premature placement decision had been made, not to the intent behind making the decision. The trial court decided this factual question against Henrico County, and the Fourth Circuit concurred.

Contrary to the assertion of Henrico County, the Fourth Circuit decision will not hamstring the schools in making decisions concerning disciplinary problems. This Court in Honig recognized the importance of parental participation in the educational decision-making. Inherent in the Honig decision is the recognition that a school cannot unilaterally suspend a child for more than 10 days because the EAHCA requires parental participation in decisions

concerning a change in placement (i.e. suspend the child).[1]

The instant case is completely consistent with Honig. Indeed, it is merely the application of the Honig rationale in a different, though related, context. Not only is a school system prohibited from unilaterally suspending a child (except for 10 days because of exigent circumstances), the Fourth Circuit is merely saying that the school system cannot make the same unilateral

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[1] This participation comes in the form of an individualized education program (IEP) meeting and subsequent discussion of any need to change placement, based on the revised IEP. The linchpin of both the procedural and substantive rights under the EHA is the development of an IEP for each handicapped child. The IEP is the written statement of the child's educational goals and objectives. The IEP is the method adopted by Congress to insure that each child's education was to be individualized with extensive parental involvement. Rowley, 458 U.S. at 208-209; Honig, at 598.

decision concerning other handicapped children.

III. There Is No Conflict In The Decision Of The Instant Case With The Decision Of Any Other United States Circuit Court Of Appeals, Nor Has The Fourth Circuit Decided A Federal Question In A Way Which Conflicts With A State Court Of Last Resort.

Henrico County has made an allegation in its petition that the Fourth Circuit's Decision in the instant case conflicts with three other cases. At most, Henrico County alludes to an inconsistency between the Fourth Circuit's decision in the instant case, and two other decisions by the Fourth Circuit, Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987) and Patterson C. v. Board of Education Of Prince George's County,

Maryland, No. 86-2638 (4th Cir. May 7, 1986)(per curiam, unpublished). (See Petition For Certiorari, pp. 20, 34) and to some unspecified conflict with a Fifth Circuit decision, Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986).

Putting aside the fact that this Court has indicated that an intracircuit conflict is insufficient grounds for granting a writ of certiorari, see Davis v. United States, 417 U.S. 333, 340 (1974), there is no real conflict between Hudson and Patterson C. on the one hand, and the instant case on the other.

Hudson is distinguishable from the instant case on the factual question of whether a premature placement decision has been made. In Hudson, the court found that there was merely a proposal to be discussed at the IEP meeting. In the instant case, the lower courts found that

a unilateral decision had been made by Henrico County. This distinction is critical. Nothing precludes school systems or parents from making proposals which are discussed and then jointly accepted or jointly rejected. As clearly found by both the trial court and the Fourth Circuit, Henrico County unilaterally decided to change Jonathan's placement.

The supposed conflict with the unpublished decision in Patterson C. was directly addressed by the Fourth Circuit in the instant case. See Petitioners' App. pp. 13-14.

There is nothing inconsistent with Jackson and the instant case. In Jackson the court was merely holding that once the school system has evidence that there are problems with the student's educational program, notice should be given and a meeting should be called.

Jackson does not stand for the proposition that the school system can unilaterally decide to change the student's placement and then give notice. Jackson stands for the proposition that once the school system is aware of a possible problem they should communicate with the parents so the problem can be addressed and solved jointly.

IV. Henrico County's Argument That There Was No Procedural Violation Because It Is Permissible To Make Placement Decisions Prior To Development Of The IEP Is Contrary To The Law And Henrico County's Own Position Taken Through The Trial Of The Case.

A. State And Federal Regulations Require Placement Decisions Be Made After Development Of The

Individualized Education Program.

The EHA and supporting regulations are explicit in requiring placement be based on an existing IEP. 34 C.F.R. § 300.552 provides: "Each public agency shall insure that ... [e]ach handicapped child's educational placement ... [is] based on his or her individualized education program ...."

In defining the term "free appropriate education" Congress provided that it "means special education and related services which ... are provided in conformity with the individualized education program ...." 20 U.S.C. § 1401(18)(D). An appropriate education, therefore, is one which addresses the goals and objectives of the IEP. An appropriate educational placement in turn be must premised on the goals and

objectives of the IEP. The appropriate placement, therefore, can only be determined after the development of the IEP containing the individualized goals and objectives.

The United States Department of Education, is emphatic in its interpretation that placement decisions must await completion of the IEP: "42. When must IEP objectives be written--before or after placement? IEP objectives must be written before placement...." 34 C.F.R. Pt. 300, App. C, at 84 (1987).

In response to another question, the same emphatic response is given:

> .... The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at an IEP meeting, it would not

be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement.(emphasis added). Id. at Ques. 5, p. 74.[2]

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[2] It is anticipated that amicus curiae will argue that this Court should grant the writ based on the Fourth Circuit's language indicating that under some circumstances a placement decision can be made prior to development of the IEP. (Pet. App. 14). The Fourth Circuit's language on this point, however, is completely consistent with the law, as interpreted by the United States Department of Education. 34 C.F.R., Part 300, Appendix C, Question 59 (1987)(quoted in Petition For Writ p. 11).

It is important to note that even in the limited circumstances envisioned by Question 59, nothing gives the school system the right to make this pre-IEP decision unilaterally. The Department of Education is explicit that "both" the parents and that school system must agree. Id. The Virginia Department of Education presently has under consideration a proposed regulation which specifically addresses this issue consistent with Question 59 and the Fourth Circuit's language in this case. See Virginia Proposed Regulation II(B)(2)(6)(b), p. 71, quoted, supra, p.

Further, it should be pointed out, that, at worse, the Fourth Circuit's language concerning permissible pre-IEP decisions is dicta.

B. Numerous State Special Education Regulations Are In Accord With The Interpretation That The IEP Must Be Developed Prior To A Placement Decision.

Numerous state regulations explicitly articulate the important concept that IEP precede placement decisions. See e.g. Alaska Education Regulations, Chapter 52, § 150(a); Connecticut State Plan for Part B of the Education of the Handicapped Act as Amended by P.L. 94-142, § 10-76-d-16; District of Columbia State Plan, Fiscal Year 1987-1989, § 3007.4; Indiana State Board of Education Rules, Regulations and Policies, Rule S-1(4)(E)(3)(c) (1978); Louisiana Regulations For Implementation of the Exceptional Children's Act, § 445(A) (1983); New Hampshire Standards for Education for the Handicapped

Students, § 1115.02. Each of the above cited provisions is quoted in Statutory And Regulatory Provisions, supra p. .

In Virginia, the regulations parallel the language of federal regulation 34 C.F.R. § 300.552, and provide "Each LEA placing a child shall ensure that ... [e]ach child's educational placement ... [i]s based on his/her IEP ...." Regulations Governing Special Education Programs For Handicapped Children And Youth In Virginia, II(B)(2)(i)(1)(b).

C. In Argument In The District Court, Henrico County Itself Has Recognized That The Placement Decision Is To Follow Development Of The IEP.

Henrico County, despite taking a contrary position on appeal, has

indicated that it accepts that development of the IEP must precede a decision on placement.

As late as the final memorandum of law submitted to the district court on the procedural violation issues, Henrico County stated: "The defendants have never asserted that a placement decision can be made before an IEP meeting." Defendants' Reply Memorandum In Support Of Motion To Alter Or Amend, p. 3.

V. The Petition Should Be Denied Because Even Were Henrico County Successful In Seeking A Reversal Of The Fourth Circuit's Procedural Violation Rationale, An Independent Rationale For Affirmation Exists On The Grounds That, Even In The Absence Of A Procedural Violation, Henrico County's IEP Would Not Provide Jonathan With A FAPE.

The Fourth Circuit's decision did not accept the lower court's reasoning that, independent of the procedural violation, Henrico County's IEP would not provide a FAPE, The panel believed that the burden of proof was misapplied by the trial court. (Pet. App. 11) The Spielberg's assert that the trial court was correct in the allocation of the burden of proof, and that the substantive decision of the trial court that the IEP was inappropriate is an alternative ground for upholding the Fourth Circuit's decision.

Should this Court grant Henrico County's petition, the Spielberg's seek to challenge the Fourth Circuit's reasoning on the burden of proof and establish that the appropriate allocation of the burden of proof was upon Henrico County.

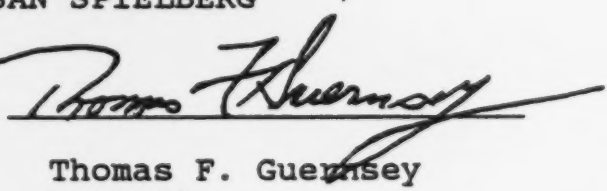
This question is important for two reasons. First, as stated, this provides an alternative ground for upholding the Fourth Circuit decision, and is properly raised in this Court without a cross-petition. Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979)(cross-petition not necessary "to defend a judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered ...."). Second, even if Henrico County were successful in this Court, the case would have to be remanded to the trial court for a determination of the substantive question, allocating the burden of proof to the parents. If the Spielbergs are successful in having this Court accept the additional rationale that the burden of proof was appropriately applied, this remand would be unnecessary, since the Fourth Circuit

could then decide whether the trial court's factual conclusion was clearly erroneous.

CONCLUSION

The Petition for Writ of Certiorari should be denied. If, however, this Court grants the writ, the Court should also consider whether the Fourth Circuit was in error in stating the trial court misapplied the burden of proof.

JONATHAN SPIELBERG
HOWARD SPIELBERG
SUSAN SPIELBERG

By 

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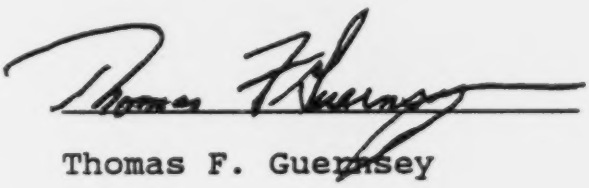
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 1989, a true and accurate copy of the foregoing Respondents' Brief In Opposition was mailed First Class to Joseph Thomas Tokarz, II, counsel for Petitioners, at P.O. Box 23120, Richmond, Virginia 23223, and to Kathleen S. Mehfoud, counsel for amicus, at 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



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